

IN THE SUPREME COURT OF ONTARIO

IN RE THE ONTARIO HUMAN RIGHTS CODE, R.S.O. 1970, c. 318, AS AMENDED;

AND IN RE A COMPLAINT BY MRS. DOROTHY CUMMINGS THAT HER DAUGHTER, GAIL CUMMINGS, WAS DENIED ACCOMMODATION, SERVICES OR FACILITIES OR DISCRIMINATED THEREIN ON ACCOUNT OF HER SEX BY THE ONTARIO MINOR HOCKEY ASSOCIATION CONTRARY TO SECTION 2(1)(a) and (b) OF THE ONTARIO HUMAN RIGHTS CODE.

APPELLANT'S STATEMENT

PART I

The Appeal

1. This is an appeal by the Ontario Human Rights Commission from the Order of the Divisional Court (Evans, C.J.H.C., Steele and Carruthers, JJ.) dated August 15th, 1978, allowing an appeal from a Decision dated October 31st, 1977 by Professor Mary Eberts sitting as Chairman of a Board of Inquiry appointed under the Ontario Human Rights Code, R.S.O. 1970, c. 318.

2. The learned Chairman of the Board of Inquiry held that the Respondent, the Ontario Minor Hockey Association, had discriminated against Gail Cummings because of her sex contrary to S. 2(1)(a) of the Ontario Human Rights Code. That decision was set aside by the Divisional Court. Leave to appeal was granted by this Court (Jessup, Lacourciere, Morden JJ.A.) on November 20th, 1978.

PART II

The Facts

Gail Cummings' Hockey Career

3. Gail Cummings, then aged 10, answered an advertisement in a Huntsville local paper, dated September 30th, 1976, advertising registration for boys and girls in the Huntsville Minor Hockey Association. She registered in the Association and played in the Atom Division (9 and 10 year olds) as a goaltender.

Appeal Book, Exhibit A, p. 35.

Evidence of Mrs. Cummings, p. 7, l. 27 to p. 8, l. 9
p. 8, l. 29 to p. 9, l. 3

4. Out of all the players in the town league, the Huntsville Minor Hockey Association selects an all-star team to represent the Town of Huntsville in Ontario Minor Hockey Association (OMHA) competition. Try-outs for the all-star team were advertised in the local paper on October 21st, 1976. The advertisement did not in any way indicate that the try-outs were restricted to boys only and Mrs. Cummings did not know there was a rule against girls playing on the team.

Appeal Book, Exhibit B, p. 36.

Evidence of Mrs. Cummings, p. 11, l. 11-14
l. 23-30
p. 23, l. 27 to p. 24, l. 3

5. The all-star team is broken down into the same age groups as the town league. The Huntsville Atom All-Stars play approximately 30 games within their own league and also play in tournaments and provincial play-downs. There are many more benefits derived from playing on the all-star team than there are from playing in the town league. A player on the all-star team is able to travel with the team, go out of town, obtain more practice time and presumably better coaching. At the Board Hearing, Barry Webb, the coach of the Huntsville Atom All-Stars, testified the house league players do not get more than 1-1/2 hours of ice time per week whereas all-star team players get 3-1/2 hours of ice time per week.

Evidence of Mrs. Cummings, p. 12, l. 17 to p. 13, l. 6

Evidence of Webb, p. 56, l. 26 to p. 57, l. 4
p. 54, l. 21 to p. 55, l. 8

6. Gail tried out for the all-star team as goaltender and she was one of the three goalies selected to the team. As required, she signed a Canadian Amateur Hockey Association 1976-1977 player registration certificate.

Appeal Book, Exhibit C, p. 37

Evidence of Mrs. Cummings, p. 13, l. 13 to 30
p. 15, l. 4 to 5

7. Gail played four games for the Huntsville Atom All-Stars. After the fourth game, her coach was advised by Brian Verbonic, the President of the Huntsville Minor Hockey Association, that Gail's registration card had not been approved and she could not play any more all-star games. The only reason that Gail could not play in

OMHA competition was because she is a girl. There was no other reason.

Evidence of Webb, p. 63, l. 17 to 22.

Evidence of Kinkley, p. 39, l. 13 to 19.

8. Hockey in Huntsville, including OMHA competition is played in the local town arena which is publicly owned. The demands on the arena for ice time are very heavy. Many organizations use the time for figure skating, old timers' hockey, recreation, etc.

Evidence of Mrs. Cummings, p. 18, l. 12 to 16
p. 38, l. 8 to 12.

Evidence of Verbonic, p. 292, l. 27 to 30.

9. When Gail plays hockey in Huntsville, she changes at home and arrives dressed at the arena. If she plays out of town, she uses the ladies' washroom. Eventually, she goes into the team dressing room about five or ten minutes before the game when all the players are dressed in order to receive the coach's final instructions. Gail has never been hurt playing hockey.

Evidence of Mrs. Cummings, p. 18, l. 20 to p. 19, l. 6

10. Coach Webb testified that the boys on the team accepted Gail as a player. Mrs. Cummings never received any complaints from anyone about her daughter playing hockey in mixed competition.

Evidence of Webb, p. 89, l. 17 to 25.

Evidence of Mrs. Cummings, p. 19, l. 30 to p. 20, l. 3.

11. There is a girl's hockey team in Huntsville called the Huntsville Honeys. The girls playing on that team are between the ages of 13 and 20. There is no team of Gail's age group for girls within at least a 20 to 40 mile radius of Huntsville.

Evidence of Mrs. Cummings, p. 19, l. 10 to 29.

12. Mrs. Cummings' position is that her daughter should be able to play on any team within her age division so long as she is physically capable of making the team. On December 8th, 1976, she filed a Complaint of discrimination with the Ontario Human Rights Commission which is the subject matter of these proceedings.

Evidence of Mrs. Cummings, p. 26, l. 22 to 28.

Appeal Book, Exhibit D, p. 38.

The OMHA

13. The OMHA is an autonomous, unincorporated association but is a member of its provincial branch, the Ontario Hockey Association (OHA, which is incorporated) and as such is part of the Canadian Amateur Hockey Association (CAHA). One of the officers of the CAHA is in charge of minor hockey in Canada. The OMHA provides organized hockey competition in southern Ontario (except Toronto) for boys under the age of 19. The Constitution of the OMHA states that its objects are, inter alia:

- "a. to promote, encourage and govern Juvenile, Midget, Bantam, Pee-Wee, Atom and Novice Hockey for boys in the Province of Ontario...
- c. To carry out competition for championships.
- d. The aims of the Association are as follows: to inculcate in the boys certain ideals ... sport for sport's sake and for the greatest number."



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Evidence of Christie, p. 199, l. 13 to 16.

Evidence of Kinkley, p. 225, l. 26 to 30.

Evidence of Juckes, p. 262, l. 25 to 29.
p. 286, l. 9 to 16.

Appeal Book, Exhibit H, p. 77.

14. Mr. Kinkley admitted that Clause a of the OMHA Constitution could be changed by the Association at its annual meeting in accordance with the provisions of the Constitution for amendment. That has never been discussed, tried or done.

Evidence of Kinkley, p. 245, l. 13 to 22.

15. Any boy in Ontario within the area of jurisdiction of the OMHA so long as he is the right age, and so long as he is good enough, can play in OMHA sponsored hockey. The OMHA is the biggest organization providing competitive hockey in Ontario below the junior level. There is no other comparable organization in the Province. In the area in which the OMHA operates, generally speaking, it provides the highest level of competitive hockey below the junior level. In 1976, approximately 36,000 players signed CAHA player certificate cards in the OMHA and there were approximately 585,000 players playing hockey in Canada under the auspices of the CAHA.

Evidence of Kinkley, p. 235, l. 20 to 23.
p. 236, l. 12 to 25, p. 239, l. 1 to 6.
p. 237, l. 10 to 22.

Evidence of Juckes, p. 266, l. 6 to 10.

16. The OMHA does not own any arenas itself. The games which are played under OMHA auspices are played in municipally or publicly owned arenas throughout the province. The OMHA does not provide or rent the ice for the games it has sponsored.

Evidence of Kinkley, p. 240, l. 22 to p. 241, l. 5.

17. The OMHA had an operating budget for 1976/77 of approximately \$152,000. The two main sources of all OMHA funds are team entry fees and play-off gate receipts. In the quarter finals, semi-finals and finals of OMHA competition, the OMHA takes 20% of the gate receipts out of the price of the tickets paid for by the public. In addition, the OMHA received a grant of \$4,500 from its affiliated body, the OHA.

Evidence of Kinkley, p. 228, l. 21 to p. 229, l. 24.

Appeal Book, Exhibit K, p. 133.

18. The OMHA, on behalf of the OHA, also operates part of a referee certification program. In the years 1976 to 1978, the OHA received a \$200,000 government subsidy in connection with this program.

Evidence of Kinkley, p. 231, l. 2-26.

Evidence of Bellaisle, p. 348, l. 20 to 29.

19. The CAHA is recognized by the International Ice Hockey Federation as the governing body for hockey in Canada. It is also recognized by the Canadian Olympic Association as the governing body for Canada and by the Federal Government as the governing body for amateur hockey in Canada.

Evidence of Juckes, p. 260, l. 21 to 28.

Mixed Competition

20. Insofar as it is relevant, there was no evidence adduced by the OMHA to the effect that integrated hockey would physiologically harm young people involved or to the effect that the physiological differences between boys and girls were so marked that playing hockey together would eliminate real opportunities for enjoyable and effective competition. Such evidence as did come forward on the issue of physiological differences went the other way.

21. David McMaster, the athletic director of St. George's College with a long experience in coaching hockey, was of the view that under the age of 15 years or so there is no harm in integrated sports competition. He testified that this view was substantiated by the Ontario Level 1 Theory course developed by the Ontario Government Ministry of Recreation and Culture to improve the standards of coaching in the Province of Ontario.

Evidence of McMaster, p. 119, l. 23 to p. 120, l. 11.

22. Abby Hoffman, now a sports consultant with the Ministry of Culture and Recreation and formerly a competitor at the highest levels of international competition, also gave evidence on behalf of the Complainant. In her capacity as a consultant, she did a study of sports opportunities for girls and women in the Province of Ontario in order to attempt to identify the reasons for their

lower participation rate. She found there were principally two factors; one, sociological in the sense that the more highly competitive the activity, the more it was regarded as a legitimate male activity and a considerably less legitimate female activity. In addition, she testified that she found that where girls were becoming interested in playing various sports there were many roadblocks preventing them from becoming involved.

Evidence of Abby Hoffman, p. 140, l. 16 to l. 28.

23. Ms. Hoffman also gave evidence that she found there were many highly discriminatory attitudes held by individuals responsible for running sports activities and sports governing bodies. The ultimate result of this was that boys were offered about twice as many hours a week of sports activity as were girls.

Evidence of Abby Hoffman, p. 141, l. 8 to l. 28
p. 143, l. 7 to l. 24.

24. Ms. Hoffman testified that she and Dr. Ann Hall, a professor of physical education at the University of Alberta, conducted research in order to establish whether or not there were significant physiological differences between males and females, particularly under age 14 or 15, which would result in girls or boys apparently being more or less interested in sports activities. Their research found that in every age group studied, girls were superior to boys in terms of flexibility and mobility, while in the

areas of endurance, stamina, speed, power and the ability to acquire athletic skill, boys and girls under the age of 13 had more or less comparative facility.

Evidence of Abby Hoffman, p. 146, l. 18 to p. 147, l. 29.

25. None of the witnesses who testified on behalf of the Respondent were aware of any studies or research in support of the OMHA's position against mixed hockey competition. Each of them quite candidly admitted he was expressing a personal subjective opinion.

26. Apart from hockey, Gail swims, figure skates, competes in track and field and for two seasons has played lacrosse. Lacrosse is organized in pretty well the same way as hockey and Gail made the town representative lacrosse team where she plays defence. But there is no rule in the Ontario Minor Lacrosse Association against mixed competition despite the evidence it is a rougher sport than hockey (since in lacrosse the cross-check is legal).

Evidence of Mrs. Cummings, p. 21, l. 26 to l. 30.

Evidence of Webb, p. 66, l. 1 to p. 67, l. 7.

Evidence of Christie, p. 200, l. 30 to p. 201, l. 12.
p. 203, l. 12 to l. 16.
p. 212, l. 29 to p. 213, l. 5.

Appeal Book, Exhibit I, p. 123.

PART III

The Issues and The Law

27. This case turns solely on the interpretation of Section 2 of the Ontario Human Rights Code, a section on which apart from this case there is a lack of judicial authority.

28. There is no dispute that the sole reason Gail Cummings was denied the opportunity to play OMHA hockey was because of her sex. There is no evidence to support and the OMHA did not assert in the Divisional Court any exemption based on Section 2(2) of the Code or any non-statutory defence.

(a) Therefore, the principal issue in the case is whether the OMHA denied to Gail Cummings

" . . . services or facilities available
in any place to which the public is
customarily admitted."

contrary to Section 2(1)(a) of the Code.

(b) There is a second issue on which the Divisional Court made no finding and that is whether in light of its status as an unincorporated association, the OMHA is a "person" within the provisions of Section 2 of the Code.

29. It is respectfully submitted that human rights or anti discrimination legislation is remedial and ought to be read with an approach sympathetic to its objectives. In so doing, it is proper to take into account the preamble.

The Interpretations Act, R.S.O. 1970, c. 225, s. 10.

National Organization for Women, Essex County Chapter et al v. Little League Baseball Inc. (1974) 318 A (2d) 33 (Superior Court of New Jersey, Appellate Division)

Gundy v. Johnston (1912) 28 O.L.R., varied on other grounds, 28 O.L.R. 127; aff'd 48 S.C.R. 516.

Regina ex rel Nutland v. McKay (1956) 5 D.L.R. (2d) 403.

Re A.G. Alberta and Gares, 67 D.L.R. (3d) 635.

30. It is submitted that Evans, C.J.H.C. was correct in holding:

- (a) That the words "services or facilities" in Section 2 should not be read ejusdem generis with the term "accommodation" and that

"they should not be given a narrow construction which would limit them to services or facilities usually provided by restaurants, public libraries, theatres, dance halls, arenas and parks to mention only a few."

Appeal Book, p. 9 to 10.

- (b) That the Respondent, the OMHA, does provide services and facilities by way of operating competitions, conducting referee and coaching clinics and in offering a structured program for the promotion of boys' hockey.

Appeal Book, p. 9 to 10.

(c) That the services and facilities provided by the OMHA are made available in a hockey arena which is clearly a place to which the public is customarily admitted.
Appeal Book, p. 11.

Sex Discrimination Act, 1975 (England) ss. 29, 34, 35, 44.

Race Relations Board v. Applin [1973] 2 All E.R. 1190;
aff'd [1974] 2 All E.R. 73.

Beattie v. Governors of Acadia University, 72 D.L.R. (3d) 718

Nat. Org. for Women v. Little League Baseball, *supra*.

The Shorter Oxford English Dictionary.

31. It is respectfully submitted that these are the only findings necessary to hold the OMHA in contravention of Section 2 of the Code. In its plain and ordinary meaning, there are no other ingredients to a breach of Section 2(1)(a).

32. It is respectfully submitted that the reasons of the Divisional Court are in error in the following material respects:

- (i) In reading into Section 2(1)(a) after the word "available" the words "to the public". It is submitted that a court ought not to alter the meaning of a statute by adding words, especially where it might defeat the intention of the Legislature as disclosed by the words actually used.

Re Canadian Northern Railway (1909) 42 S.C.R. 443.

G.T.P. Ry et al v. Dearborn, 58 S.C.R. 315.

Walsh v. Trebilcock, 23 S.C.R. 695.

- (ii) In holding, in any event, that the OMHA in providing services and facilities to boys within relevant age categories was not providing those services and facilities "to the public". With respect, the logical extension of this reasoning is that any person or organization could defeat the application of the Code by, in effect, violating its provisions.
- (iii) By appearing to hold that a private volunteer organization has the right to discriminate without being subject to Section 2. It is submitted that Section 2 of the Code makes no distinction in terms of the nature of the organization. What is important is what is provided and where it is provided. In any event, on the facts here, it is submitted the OMHA is anything but a private organization. Rather it is part of a large, well organized and publicly funded structure which has government recognition and which controls not only amateur hockey in this country but Canada's position in international hockey as well.

(iv) In holding that the OMHA merely provides a benefit for boys but does not discriminate against girls. No one can compel the OMHA to provide organization hockey assistance but, it is submitted, once it does so and makes use of public places, it does discriminate within S. 2. The Code recognizes the right of persons to benefit one or more classes in society and thus discriminate against others [see S. 6a, 4(7), 4(8)] in limited cases but no such right is given in respect of the activities covered by S. 2 (apart from grounds of public decency).

Insurance Corp of B.C. and Heerspink (1978 B.C.C.A.)

33. It is further submitted that the Divisional Court erred in failing to hold that the OMHA is a "person" within the meaning of Section 2 of the Code.

The Ontario Human Rights Code, ss. 4(7), 19(h).

Gretzky v. OMHA, 10 O.R. (2d) 759 (H.Ct.)

Boduch v. Harper and OHA et al, 10 O.R. (2d) 755 (H.Ct.)

34. It is respectfully submitted that the purpose of Section 2 of the Code is to prevent discrimination by any person or organization whatever its nature which provides accommodation, services or facilities and which makes use of public places in doing so. It is submitted that is the standard prescribed by the legislation and the OMHA's activities come within that standard. If there are to be exceptions to the standard, it is for the Legislature to enact them.

35. Sex segregated activities no less than racially segregated activities are inherently unequal and thus are a denial of the principles of individual equality upon which the Ontario Human Rights Code is based.

Brown v. Board of Education (1954) 347 U.S. 483.

Commonwealth of Pennsylvania v. PIAA (1975) 334 A (2d) 839.

Brenden v. Independent School District (1972) 342 F. Supp. 1224; 477 F (2d) 1292.

Sex Discrimination in High School Athletics Note, 57 Minnesota Law Review 339.

36. Moreover, in this particular case, the evidence before the Board establishes that integrated hockey competition, particularly up to age 14, is reasonable and is the only way Gail Cummings can play at a level of hockey suited to her ability. Sex segregated hockey is, it is submitted, based on outdated stereotypes about the roles and abilities of females and fails to provide for an individual assessment of a female's qualifications and therefore ought, where possible, to be eliminated.

37. Finally, it is submitted that the Chairman of the Board of Inquiry had jurisdiction to make the Order which she did.

The Ontario Human Rights Code, S. 14c.

PART IV

Nature of Order Requested

38. The Applicant respectfully requests an Order allowing this appeal and reinstating the Order of the Chairman of the Board of Inquiry, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

JOHN I. LASKIN
Counsel for the Appellant

IN THE SUPREME COURT OF ONTARIO

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APPELLANT'S STATEMENT

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